



Dissenting in General: Herring v. United States, in Particular

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DISSENTING IN GENERAL:
HERRING V. UNITED STATES, IN PARTICULAR

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One can describe Justice Ginsburg as a reluctant dissenter. She agrees with Chief Justice Roberts that the Supreme Court provides clearer guidance and its opinions receive more deference when they are unanimous. When deciding whether to write separately, she asks, “Is this dissent or concurrence really necessary?”¹ “Really necessary” dissents would include not only those that force the majority to improve their opinion,² or those that could well become a majority opinion after drafts are exchanged. They involve dissents that have implications beyond the case at hand, and even beyond the court audience. A dissent, she said, can be “an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error. . . .”³ Beyond the canonically famous dissents, Justice Ginsburg pointed to Justice Breyer’s dissent in *Parents Involved*⁴ and the dissents in *District of Columbia v. Heller*,⁵ as those that appeal to posterity. Equally critical, some dissents can garner publicity and create pressure for legislative change. As an example, Justice Ginsburg identified her dissent in the *Lilly Ledbetter* case,⁶ which resulted in legislative change in 2009. In the final analysis, Justice Ginsburg expressed hope that her dissents will be stronger for having the wisdom to “choos[e] [her] ground.”⁷

Given this philosophy, Justice Ginsburg’s dissent in *Herring v. United States*,⁸ on the surface, a garden-variety Fourth Amendment exclusionary rule case, takes on special resonance. In *Herring*, a police officer, suspicious of the defendant who was seeking to gather something from his impounded truck, requested a warrant check. The officer was told that the

computer database in the sheriff's department of a neighboring county showed an active warrant for Herring's arrest. The report was in fact in error; the computer database was at odds with the physical records in the same office. The warrant had been recalled some five months before and was corrected only minutes after Herring was arrested and a search incident to that arrest found an illegal firearm and drugs. That Herring's arrest violated his Fourth Amendment rights was uncontested; the only issue was whether the evidence the police obtained through the unlawful search should have been suppressed.

The majority in *Herring* held exclusion was not warranted because the police error "was the result of isolated negligence attenuated from the arrest."⁹ Consider the concepts: Not only was "negligent" police conduct protected from exclusion, but so too was negligent police conduct that was "isolated," and "attenuated." Trivializing the misconduct, the Court held that it did not implicate the "core concerns" of the Fourth Amendment, as did the earlier exclusionary rule cases which involved flagrant police misconduct. When the police behave only negligently, it reasoned, deterrence made no sense. Applying a cost-benefit analysis, and concluding that the costs of exclusion far outweighed its benefits, the Court rejected exclusion.

While the Fourth Amendment's exclusionary rule has been narrowed in a host of prior Supreme Court decisions, to Justice Ginsburg, the majority's opinion went too far. A dissent—and a particularly forceful one—was warranted, clearly not in the hopes of improving the majority's decision or supplanting it. That was unlikely. This was a dissent for posterity—a call to future courts to undo what the majority had done. First, Justice Ginsburg refocused the inquiry on a "more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule," as a constraint on the sovereign, and as essential to protecting the integrity of the Court. Indeed, the dissent was buttressed not only by the early suppression cases, like *Mapp v. Ohio*,¹⁰ but also the legendary dissents of Brandeis and Holmes in *Olmstead v. United States*¹¹ and Brennan in *United States v. Calandra*.¹²

And then Justice Ginsburg, meeting the majority's decisions on its own terms, deconstructed its "cost-benefit" benefit analysis. First, the contention that the exclusionary rule addresses only conduct that is intentional or reckless, not merely negligent, is fundamentally inconsistent with the very premises of tort law that liability for negligence creates an incentive to act with greater care.¹³ And such a test narrowed the exclusionary rule to a virtually unprovable conduct—reckless or deliberate misconduct on the part of police, and negligent conduct that is not just "isolated" or "attenuated."

Second, this narrowing is particularly troubling in modern police forces with computerized databases. Attentive to the future cases which were sure to come, and to future technologies, Justice Ginsburg noted that "[i]naccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty."¹⁴ Finally, the costs here were minimal, not the cost of letting the prisoner go free, as the majority touted, echoing Cardozo's famous critique of the exclusionary rule ("The criminal is to go free because the constable has blundered.") Rather, the costs were the costs of compliance, of creating incentives to check the database for accuracy, which was no less critical when it was the misconduct of bureaucrats who were just not paying attention.

To be sure, Justice Ginsburg's critique could well have been even more pointed. Fourth Amendment scholar Wayne R. LaFare compared the *Herring* decision to a "surstömning, which (as any Swede can tell you) is touted as a 'delicacy' but is actually attended by both a loathsome smell that 'grows progressively stronger' and a dangerous capacity to 'explode' beyond its existing boundaries."¹⁵ The majority's position enabled the police to evade the exclusionary rule when one officer in good faith relied on another officer's bad faith, hiding behind the bureaucracy rather than holding "the police" accountable as an entity. Moreover, this was the first exclusionary rule case, as the petitioner argued, where the Court excused police failure, not the failure of other actors in the criminal justice system. And, rather than creating a bright line, it encouraged litigation in the lower federal courts about when negligent conduct is "attenuated" or "isolated" and when it is not.

But, without name calling—maligning the poor “surstömming”—the point was made. It was really, *really* necessary, underscoring themes that Justice Ginsburg would then revisit in subsequent Supreme Court terms, as the majority narrowed the Fourth Amendment’s exclusionary rule still further.



ENDNOTES

- 1 Hon. Ruth Bader Ginsburg, Lecture, The Role of Dissenting Opinions, 95 Minn. L. Rev. 1, 3 (2010).
- 2 For example, Justice Ginsburg credits Justice Scalia’s dissent in *United States v. Virginia*, 518 U.S. 515 (1996) with making her opinion for the Court better. *Id.*
- 3 *Id.* at 4 (quoting CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936)).
- 4 551 U.S. 701 (2007).
- 5 128 S.Ct. 2783 (2008).
- 6 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
- 7 *Id.* at 8.
- 8 129 S.Ct. 695, 698 (2009).
- 9 *Id.*
- 10 367 U.S. 643, 652 (1961).
- 11 277 U.S. 438, 469-71 (1928) (Holmes, J., dissenting); *Id.*, at 477-79, 483-85 (Brandeis, J., dissenting).
- 12 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).
- 13 555 U.S. at 154.
- 14 *Id.* at 155.
- 15 Wayne R. Lafave, “The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule,” 99 J. Crim. L. & Criminology 757, 759 (2009).